

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BONNIE V. FLOURNOY**

Claimant

VS.

**WAL-MART**

Respondent

AND

**AMERICAN HOME ASSURANCE COMPANY**

Insurance Carrier

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Docket No. 1,026,448

**ORDER**

Claimant appealed the February 28, 2006, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

Claimant fell at work on October 22, 2005, and injured her right upper extremity and the right side of her chest. In the February 28, 2006, Order, Judge Barnes denied claimant's request for workers compensation benefits. The Judge concluded claimant failed to prove her accident arose out of and in the course of her employment with respondent.

Claimant appealed the February 28, 2006, Order. Claimant did not file a brief with the Board within the time allotted. Accordingly, the Board does not have the benefit of claimant's legal theory and argument regarding the compensability of this claim.

On the other hand, respondent and its insurance carrier filed a brief with the Board in which they contend claimant's accident did not arise out of and in the course of her employment with respondent. They first argue claimant's accident is not compensable as at the time of the accident she was allegedly shopping, which was prohibited by respondent. They next argue claimant's accident is not compensable as it allegedly resulted either from horseplay or from an assault that was not related to her work.

The only issue before the Board on this appeal is whether claimant's accident arose out of and in the course of her employment with respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Board finds and concludes:

Respondent employed claimant as a cashier. On October 22, 2005, claimant fell as she was preparing to go on her lunch break. Shortly before her accident, claimant placed two or three room deodorizers or air fresheners, which she intended to purchase during her break, into a nearby shopping cart.

Claimant's testimony regarding the accident is inconsistent. At the preliminary hearing, claimant first testified she did not know how the accident happened as she was standing next to the customer service managers' podium and the next thing she remembers is being on the floor. But claimant believes another individual, a co-worker named Ella who was in the store shopping, made her fall. Claimant testified she had been told the co-worker had admitted to making her fall.

Respondent and its insurance carrier presented the testimonies of four employees. Sherry Schwein, who is a sales clerk and is also on the store's safety team, testified claimant was unable to tell her how the accident happened. Conversely, Tereasa Elliott, who is the store's personnel manager, testified claimant said the accident happened while "kidding around over a shopping cart."<sup>1</sup>

One of respondent's customer service managers, Shelly Corbin, was nearby when claimant fell. Although she did not see what caused claimant to fall, Ms. Corbin did see claimant pushing the shopping cart and Ella standing at the front of the cart. And finally, Linda Hoppes, another customer service manager, provided the most detailed description of the accident. Ms. Hoppes actually saw claimant fall after stepping away from the shopping cart.

After she dropped off her bag, she [claimant] came up to the podium. They have a clipboard that they sign in and out, and let's us know exactly what time they go to lunch so we can keep track of what time they should be back. She signed out. There was a basket by the podium that had some merchandise in it, and she took that cart to walk towards the back to go clock out and that is when she met Ella who was actually a customer that day, shopping with her daughter. And Ella wanted to see what she had in the cart, just, you know, because it was a good deal, a good purchase. So they tugged on the cart back and forth. Bonnie [claimant] was on the back side of it and Ella was on the front side of it and it was a friendly little tugging. There was no one mad, or, you know, angry at this point. And what I observed, I was standing back by -- our podium is here and back behind that is the menswear department and that's where we stand a lot of times to watch the whole front end. And that's where I was standing

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<sup>1</sup> Elliott Depo. at 19.

and it was just a little bit in front of me, but I could hear what was going on. We were all laughing and joking around about it. And Bonnie went -- stepped back and that's when she fell to the ground. And it looked to me like she hit her skirt. And that's when she fell and hit the floor and then Ella tried to help her up.<sup>2</sup>

Ms. Hoppes surmised that claimant tripped on the long skirt that she was wearing, but Ms. Hoppes is not certain.<sup>3</sup>

The Board is not persuaded claimant is being forthright in her testimony. There is no explanation why claimant is able to remember details of her activities immediately before her accident but she remembers nothing about the accident itself. In addition, the testimonies from both Ms. Corbin and Ms. Hoppes indicate that claimant had signed out at the time of the accident and that she was walking to the back of the store to clock out. That contradicts claimant's testimony that at the time of her accident she was standing in line waiting to sign out at the customer service managers' podium.

On the other hand, Ms. Hoppes' description of the accident is credible and persuasive. The Board finds the greater weight of the evidence establishes that claimant had signed out and had begun walking to the back of the store to clock out for her lunch break. At that point, claimant was approached by Ella, who began trying to look into the cart that claimant was pushing. And claimant tripped and fell.

The Board concludes claimant's accident arose out of and in the course of her employment with respondent as the accident occurred while claimant was walking to the rear of the store to clock out for her lunch break. Moreover, had the accident occurred during claimant's lunch break, the incident would remain compensable under the Workers Compensation Act as lunch breaks are deemed to be incidental to employment.

Injuries occurring *on the premises* during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he or she pleases.<sup>4</sup>

In addition, the Board does not find that Ella's attempt to look into claimant's shopping cart rose to the level of horseplay. Nevertheless, if that activity were deemed to be horseplay,

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<sup>2</sup> Hoppes Depo. at 7-8.

<sup>3</sup> *Id.* at 16.

<sup>4</sup> 2 *Larson's Workers' Compensation Law* § 21.02[1][a] (2005).

the evidence does not establish that claimant was a willing participant, which is now required before workers compensation benefits are forfeited.<sup>5</sup>

Finally, the Board finds little merit in respondent and its insurance carrier's argument that claimant was shopping at the time of the accident and, therefore, she should be denied workers compensation benefits as she was engaging in a prohibited activity. The evidence fails to establish that claimant was shopping at the time of the accident. Conversely, as indicated above, the greater weight of the evidence establishes that claimant was walking to the rear of the store to clock out for her lunch break.

In conclusion, despite her reticence in describing the details surrounding her accident and despite the Board's reluctance in rewarding that reticence, the evidence establishes that claimant's accident arose out of and in the course of her employment with respondent. And the evidence fails to establish that claimant had abandoned her work activities by pushing the shopping cart on the way to the rear of the store to clock out. Consequently, claimant is entitled to receive workers compensation benefits for her October 22, 2005, accident.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.<sup>6</sup>

**WHEREFORE**, the Board reverses the February 28, 2006, preliminary hearing Order and holds that claimant's October 22, 2005, accident arose out of and in the course of her employment with respondent. The Board remands this claim to the Judge for further proceedings consistent with this order. The Board does not retain jurisdiction over this proceeding.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2006.

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BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant  
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>5</sup> *Coleman v. Armour Swift-Eckrich*, \_\_\_\_ Kan. \_\_\_\_, 130 P.3d 111 (2006).

<sup>6</sup> K.S.A. 44-534a(a)(2).